FEDERAL EXPRESS BROKERAGE SDN BHD & ORS A

v.

MALAYSIA AIRPORTS (SEPANG) SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
RAMLY ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-3327-2010]
13 DECEMBER 2011 C

ADMINISTRATIVE LAW: *Remedies - Declarations - Decision of Minister of Finance to impose free zone charges at KLIA free commercial zone ('FCZ') - Whether appellants liable to make payment for arrears of FCZ charges - Whether imposition of FCZ charges ultra vires Free Zones Act 1990 and Free Zones Regulations 1991 ('Regulations') - Whether reg. 8A Regulations could be effective retrospectively - Free Zones Act 1990, ss. 10(3) & 13(2)* D

The appellants, who were members of the Air Freight Forwarders Association of Malaysia ('the AFAM'), were at all material times carrying out activities in the Kuala Lumpur International Airport ('KLIA') Free Commercial Zone ('FCZ'). The first respondent was at all material times the authority appointed by the Minister of Finance ('the Minister'), under s. 2 of the Free Zones Act 1990 ('the Act'), to administer, maintain and operate the KLIA free zone area, while the second respondent was a company wholly owned by Malaysia Airport Holdings Bhd. The Minister had directed the first respondent to impose free zone charges on the appellants but the latter had refused to pay the FCZ charges on the grounds that they were excessive and *ultra vires* the Act. The Ministry of Finance then sought the assistance of the AFAM to request its members to pay arrears of the FCZ charges, which amounted to RM24,092,834 as at 14 May 2007 to the first respondent. Hence, the appellants commenced an action against the respondents. It was the appellants' case that the Minister's authority to direct the first respondent to impose a free zone charge only came into force on 20 April 2007 when the new reg. 8A was introduced into the Free Zones Regulations 1991 (the Regulations). Thus, the appellants contended that prior to 20 April 2007, there was no provision either in the Act or the Regulations that gave the first respondent the power to impose any FCZ E F G H I

charges and that they were not liable to pay FCZ charges prior to 20 April 2007. By way of this action, the appellants sought certain declarations, including the declaration that the respondents had no authority to collect any monies with regards to the FCZ charges, damages and costs. The first respondent argued that the appellants' refusal to pay the FCZ charges was baseless and unlawful, in that, the Minister's direction on the imposition of the FCZ charges had been in place before the commencement of reg. 8A of the Regulations. The first respondent also submitted that the appellants had derived a benefit from the services provided by the first respondent in the KLIA FCZ and thus could not now refuse to pay for those services. The first respondent thus counterclaimed against the appellants for the services it had provided to them at the KLIA FCZ, which it had never intended to provide free of charge or gratuitously. The High Court judge found that under the provisions of the Act, the Minister was allowed to impose such conditions as he deemed fit in relation to the appellants' activities in the KLIA FCZ, which included the imposition of the FCZ charges. The trial judge also ruled that the Act imposed an obligation on the first respondent as the authority appointed by the Minister to administer, maintain and operate the KLIA FCZ. Consequently, the trial judge dismissed the appellants' claim and allowed the first respondent's counterclaim. This was the appellants' appeal against that decision.

Held (allowing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The language of ss. 10(3) and 13(2) of the Act did not show any intention on the part of the Parliament to confer on the Minister a discretion or power to impose any charge or levy in respect of the activities carried out in the FCZ but merely sought to provide the types of activities and administration that could be allowed in the FCZ. That being the case, it necessarily followed that reg. 8A of the Regulations, which came into force on 20 April 2007, was in turn *ultra vires* the Act. It is settled law that the power from any subsidiary legislation could never rise above its parent Act. (paras 26 & 27)

(2) The power to give 'such directions for the purpose of protecting revenue' under s. 13(2) of the Act should not be interpreted to include the power to impose charges for activities carried out in the FCZ. The relevant part of the

Parliament's Hansard dated 16 March 1990 indicated the real intention of s. 13 of the Act. There was no indication at all that s. 13(2) was meant to empower the Minister to impose charges on the members of the AFAM including the appellants and the Minister had no legal power to impose charges on the appellants. On this ground alone, the appellants' appeal could be allowed and the High Court judge had erred in dismissing the appellants' claim. (paras 28-30 & 45)

(3) Although the question as to whether reg. 8A of the Regulations could be effective retrospectively did not arise because the said regulation was *ultra vires* the parent Act and therefore invalid, for completeness this question was considered. Since there was no specific date for commencement stated in the Regulations, the commencement date for reg. 8A of the Regulations should be the date immediately following the date of its publication *ie*, 20 April 2007. Further, s. 47 of the Act, which is the enabling section for the Regulations, did not expressly confer any power to the Minister to legislate retrospectively. Therefore, even if reg. 8A of the Regulations was valid, it could only come into force prospectively and not retrospectively. The High Court judge had erred in allowing the respondent's counterclaim against the appellants. (paras 31, 32, 35, 36 & 43)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu, iaitu ahli-ahli Persatuan Penghantar Barangan Udara Malaysia ('AFAM'), pada setiap masa material menjalankan aktiviti mereka di Zon Perniagaan Bebas ('FCZ') Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA'). Responden pertama adalah pada setiap masa material pihak berkuasa yang dilantik oleh Menteri Kewangan ('Menteri') di bawah s. 2 Akta Zon Bebas 1990 ('Akta'), untuk mentadbir, menjaga dan menjalankan operasi kawasan zon bebas KLIA, sementara responden kedua adalah sebuah syarikat milik penuh Malaysia Airport Holdings Bhd. Menteri telah mengarahkan responden pertama supaya mengenakan bayaran zon bebas terhadap perayu-perayu, tetapi perayu-perayu enggan membayarnya atas alasan bahawa bayaran tersebut adalah terlalu tinggi dan tidak sah di sisi Akta. Berikutnya, Kementerian Kewangan meminta jasa baik AFAM supaya menuntut ahli-ahlinya membayar tunggakan bayaran kepada responden pertama, yang berjumlah RM24,092,834 setakat

A 14 Mei 2007. Oleh itu, perayu-perayu telah memulakan tindakan terhadap responden-responden. Adalah menjadi kes pihak perayu bahawa kuasa Menteri untuk mengarahkan responden pertama supaya mengenakan bayaran zon bebas hanya berkuatkuasa pada 20 April 2007 bilamana per. 8A yang baharu telah dimasukkan ke
B dalam Peraturan-Peraturan Zon Bebas 1991 ('Peraturan'). Perayu-perayu menghujah bahawa sebelum 20 April 2007, tidak terdapat apa-apa peruntukan sama ada di dalam Akta mahupun Peraturan yang memberi kuasa kepada responden pertama untuk mengenakan sebarang bayaran FCZ dan bahawa mereka tidak bertanggungan
C untuk membayar bayaran FCZ sebelum tarikh tersebut. Melalui tindakan di sini, perayu-perayu memohon beberapa pengisytiharan, termasuk pengisytiharan bahawa responden-responden tiada kuasa untuk menuntut wang berhubung bayaran FCZ, ganti rugi dan kos. Responden pertama berhujah bahawa keengganan perayu-perayu
D membayar bayaran FCZ adalah tidak berasas dan salah, kerana arahan Menteri berkaitan pengenaan bayaran FCZ dibuat sebelum per. 8 Peraturan mula berkuatkuasa. Responden pertama juga mengatakan bahawa perayu-perayu memperoleh manfaat dari perkhidmatan yang diberikan oleh responden pertama di FZC KLIA
E dan kerana itu tidak boleh kini menolak dari membayar untuk perkhidmatan tersebut. Responden pertama dengan itu menuntut balas terhadap perayu-perayu bagi perkhidmatan yang diberikan kepada mereka di FCZ KLIA, perkhidmatan yang tidak pernah diniatkan untuk diberi secara percuma atau gratis. Hakim
F Mahkamah Tinggi memutuskan bahawa di bawah Akta, Menteri dibenarkan untuk mengenakan apa jua syarat yang difikirkannya sesuai berhubung kegiatan perayu-perayu di FCZ KLIA, termasuk mengenakan bayaran FCZ. Hakim bicara juga memutuskan bahawa Akta telah mengenakan obligasi ke atas responden pertama selaku
G pihak berkuasa yang dilantik oleh Menteri untuk mentadbir, menjaga dan menjalankan operasi FZC KLIA. Berikutnya, hakim bicara menolak tuntutan perayu-perayu dan membenarkan tuntutan balas responden pertama. Perayu-perayu merayu terhadap keputusan tersebut.

H

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Perbahasaan ss. 10(3) dan 13(2) Akta tidak menunjukkan niat
I Parlimen untuk memberi kuasa atau budibicara kepada Menteri mengenakan apa-apa bayaran atau levi berhubung aktiviti-aktiviti yang dijalankan di FCZ, tetapi hanya setakat

membolehkan beliau memperuntukkan jenis aktiviti dan pentadbiran yang dibenarkan di FCZ. Dalam keadaan sedemikian, ianya harus mengikut bahawa per. 8A Peraturan, yang berkuatkuasa pada 20 April 2007, juga adalah *ultra vires* Akta. Sudah menjadi undang-undang mantap bahawa undang-undang kecil tidak boleh mengatasi undang-undang induknya.

(2) Kuasa untuk memberi 'arahan tersebut dengan tujuan melindungi pendapatan' di bawah s. 13(2) Akta tidak boleh ditafsir sebagai merangkumi kuasa untuk mengenakan caj terhadap aktiviti-aktiviti yang dijalankan di FCZ. Bahagian relevan Hansard Parlimen bertarikh 16 Mac 1990 menunjukkan niat sebenar s. 13 Akta. Tiada langsung petunjuk bahawa s. 13(2) dimaksudkan untuk memberi kuasa kepada Menteri untuk mengenakan bayaran terhadap ahli-ahli AFAM termasuk perayu-perayu dan Menteri tiada kuasa perundangan untuk mengenakan bayaran tersebut ke atas perayu-perayu. Atas alasan ini sahaja, rayuan perayu-perayu sudah boleh dibenarkan. Hakim Mahkamah Tinggi telah khilaf apabila menolak tuntutan perayu-perayu.

(3) Walaupun persoalan sama ada per. 8A Peraturan mempunyai kesan kebelakangan tidak berbangkit memandangkan peraturan tersebut *ultra vires* Akta induk dan kerana itu tidak sah, ia tetap dipertimbang demi melengkapkan keputusan. Oleh kerana tarikh berkuatkuasa tidak secara khusus diperuntukkan oleh Peraturan, maka tarikh berkuatkuasa per. 8A Peraturan adalah hari berikutnya dari tarikh penerbitan, iaitu 20 April 2007. Selain itu, s. 47 Akta, yang merupakan seksyen pemboleh Peraturan, tidak secara nyata memberikan apa-apa kuasa kepada Menteri untuk menggubal secara retrospektif. Oleh itu, jikapun per. 8A sah, ia hanya boleh berkuatkuasa secara prospektif dan bukannya retrospektif. Maka, hakim Mahkamah Tinggi khilaf apabila membenarkan tuntutan balas responden terhadap perayu-perayu.

Case(s) referred to:

Attorney-General v. Wilts United Dairies Ltd [1921] 37 TLR 884; [1922] 38 TLR 781 ***(refd)***

Comptroller-General of Inland Revenue, Malaysia v. T [1969] 1 LNS 31 FC ***(refd)***

Gosling v. Veley [1850] 12 QB 328 ***(refd)***

Gruen Watch of Canada Ltd v. Attorney General of Canada [1950] OR 429 ***(refd)***

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***
Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Issued As Incorporated Partnership) [2011] 7 CLJ 46 HC ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Pardo v. Bingham [1868-1869] 4 LR Ch App 735 ***(refd)***
Phillips v. Eyre [1870] LR 6 QB 1 ***(refd)***
Re Athlumney [1898] 2 QB 547 ***(refd)***
Re Chapman [1896] 1 Ch 323 ***(refd)***
Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491 CA ***(refd)***
Syed Ibrahim Syed Mohd & Ors v. ESSO Production Malaysia Incorporated [2004] 1 CLJ 889 CA ***(refd)***
United Asian Bank Bhd v. The Negeri Sembilan Development Corporation [1988] 1 LNS 206 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 71
Free Zones Act 1990, ss. 3(1), (2), 10(3), 13(1), (2), (4), 47
Free Zones Regulations 1991, reg. 8A
Interpretation Acts 1948 & 1967, ss. 19(1), 20

Other source(s) referred to:
Prof MP Jain, "*Administrative Law of Malaysia and Singapore*", 2nd edn, 1989, p 93

For the appellants - Elaine Yap (Mohd Arief, Emran Arifin & Azmimi Pharmy with her); M/s Wong & Partners
For the respondents - Jasmeetpal Singh; M/s Siew & Jasmeet

[Editor's note: For the High Court judgment, please see Federal Express Brokerage Sdn Bhd & Ors v. Malaysia Airports (Sepang) Sdn Bhd & Anor [2010] 1 LNS 1295].

Reported by Vani Krishnan

JUDGMENT

Ramly Ali JCA:

[1] The appellants were the plaintiffs at the court below. The present appeal is against the decision of the learned High Court judge dated 15 October 2010 dismissing the appellant's claim against the respondents for among others, certain declaratory reliefs with regard to the invalidity of the imposition of the Free Commercial Zone ('FCZ') charges by the first respondent; and

allowing the first respondent's counterclaim against the appellants and in doing so, held that the appellants are liable to make payment for the arrears of the FCZ charges to the first respondent together with interest at the rate of 8% per annum from 7 April 2008 to the date of full payment.

Factual Background

[2] The appellants at the material times were companies incorporated in Malaysia and were members of the Air Freight Forwarder Association of Malaysia ('AFAM') as well as the Conference of Asia Pacific Express Carriers ('CAPEC'). The appellants had been operating in the KLIA FCZ since 1997 when it was first set up.

[3] The respondents at all material times were also companies incorporated in Malaysia. The second respondent a wholly owned subsidiary of Malaysia Airport Holdings Berhad.

[4] Sometimes in 1996, AFAM was informed by Malaysia Airport Berhad that a Kuala Lumpur International Airport Free Commercial Zone ('FCZ') would be established with the objective of reducing paperwork for inbound and outbound cargo shipments. The establishment of the arrears of the FCZ was also to be in line with the change of environment in international freight movements.

[5] Accordingly, the FCZ was duly established under s. 3(1) of the Free Zones Act 1990 to administer, maintain and operate the free zone. The Minister in charge under the said Act is the Minister of Finance. On 19 August 1997, the Minister of Finance appointed the first respondent as the authority to administer, maintain and operate the free zone at the Kuala Lumpur International Airport Cargo Village under s. 3(2) of the Act. The authority acts on the directions of and answerable to the Minister of Finance.

[6] In 2007, the Free Zones Regulations 1991 was amended *vide* the Free Zones (Amendment) Regulations 2007 (P.U (A) 166/2007) which came into force on 20 April 2007. A new reg. 8A was introduced in the said amendment. It provides for the imposition of free zone charge. The said reg. 8A reads:

> where the Minister so directs, a free zone charge shall be payable by any person or his agent to the Authority in respect of every approved declaration under regulations 5, 21, 22, 23, 24, 25,26, 27 and 28.

Prior to the amendment (ie, prior to 20 April 2007) there was no express provision either in the Act, or the 1991 Regulations regarding the imposition of any free zone charges.

[7] On 18 May 2007, the Ministry of Finance through one Datuk Aziyah Bahauddin, the Secretary of the Tax Analysis Division issued a letter to the chairman of AFAM notifying him that the Minister of Finance had decided to maintain the charge for the FCZ at the KLIA at RM5 per declaration using specified customs declaration forms. In the same letter the Ministry of Finance sought AFAM's assistance to request its members (including the appellants) to pay and settle the arrears of the FCZ charges amounting to RM24,092,834 outstanding as at 14 May 2007 to the authority (the first respondent) to enable the authority to continue administering the FCZ.

[8] The contents of the said letter reference (C)0.217/24 Vol. 4(6) dated 18 May 2007 are reproduced below:

> Y.Bhg. Encik Walter Culas
> Pengerusi
> Airfreight Forwarders Association of Malaysia
> No. 16B, Tingkat 2
> Jalan Kemuja, Bangsar Utama
> 59000 Kuala Lumpur No. Faks: 03-22872592
>
> Tuan
>
> **Per: Cadangan CAPEC Bagi Caj Pemprosesan FCZ di KLIA**
>
> Dengan hormatnya saya adalah diarah merujuk kepada surat tuan bil. AFAM-MOF 2007/04/19 bertarikh 9 April 2007 mengenai perkara tersebut di atas.
>
> 2. Adalah dimaklumkan bahawa Kementerian ini telah mengambil perhatian keputusan Extra Ordinary Meeting (EGM) khas AFAM pada 18 April 2007 yang menolak cadangan CAPEC untuk mewujudkan "two-tier" caj pemprosesan FCZ dan bersetuju mengelakkan caj pemprosesan FCZ "single tier" yang ada sekarang.
>
> 3. Berhubung dengan perkara ini YB Menteri Kewangan telah memutuskan caj pemprosesan FCZ di Kawasan Perdagangan Bebas di KLIA, dikekalkan pada kadar RM5 bagi setiap deklarasi dengan menggunakan Borang Kastam yang telah ditetapkan.

4. Malaysia Airport (Sepang) Sdn Bhd (MAB) sebagai Pihak Berkuasa Zon di Kawasan Perdagangan Bebas di KLIA telah melaporkan ke Kementerian ini bahawa amaun tertunggak caj pemprosesan FCZ pada 14 Mei 2007 adalah sebanyak RM24,092,834. MAB juga memaklumkan bahawa mereka tidak boleh beroperasi sekiranya menanggung kerugian dan akan hanya terus sanggup menjadi Pihak Berkuasa Zon di FCZ KLIA sekiranya tunggakan tersebut dijelaskan.

5. Kerjasama pihak tuan adalah diminta supaya memastikan Ahli-ahli di bawah naungan AFAM membuat bayaran serta menjelaskan tunggakan tersebut dengan segera kepada MAB untuk membolehkannya terus mentadbir kawasan FCZ di KLIA.

Sekian, terima kasih.

"**BERKHIDMAT UNTUK NEGARA**"

Saya yang menurut perintah,

t.t.

(Datuk Aziyah Bahauddin)
Setiausaha Bahagian Analisa Cukai
b.p. Ketua Setiausaha Perbendaharaan

[9] The appellants refused to pay the charges imposed. They contended that the respondents are not allowed to arbitrarily impose the FCZ charges which they viewed as excessive and *ultra vires* the Act as there are no statutory provisions under the Act and/or the Free Zones Regulations 1991 which allow for such imposition by the first respondent.

[10] The appellants commenced the present action against the respondents in the Kuala Lumpur High Court for amongst others, the following reliefs and orders:

(a) a declaration that the letter issued by the Ministry of Finance namely dated 18 May 2007 and 14 December 2007 is void *ab initio* and/or contrary to the provisions of the law;

(b) an order for the respondents to produce accounts of the money collected from the appellants as FCZ charges from year 2000 onwards;

(c) a declaration for the first respondent to return all monies collected from the appellants from year 2000 immediately;

(d) a declaration that the respondents have no authority to collect any monies with regards to the FCZ charges; and

(e) general, aggravated and exemplary damages.

[11] The first respondent counterclaimed against the appellants for the alleged outstanding FCZ charges due as at 7 April 2008 in the following amounts:

(a) First appellant - RM5,529,185

(b) Second appellant - RM2,963,640

(c) Third appellant - RM 214,835

[12] The respondents contended that the appellants' refusal to pay the FCZ charges is baseless and unlawful; and the demands for payment of the FCZ charges made by the Minister of Finance and the first respondent are lawful. The respondents submitted that the imposition of the FCZ charges had been decided upon and directed by the Minister of Finance and the Minister's direction on the imposition of the said charges had been in place even before the commencement of reg. 8A; and this had been acknowledged by the association, AFAM. Alternatively, the first respondent stated that the sums of monies owed are reasonable which the first respondent is entitled to claim by way of *quantum merit* and pursuant to s. 71 of the Contracts Act 1950. The first respondent averred that at the material time the appellants, were justly and truly indebted to the first respondent.

[13] On 15 October 2010, after the full trial and submissions the learned High Court judge dismissed the appellants claim and allowed the first respondent's counterclaim. In coming to her decision, the learned High Court judge found that the FCZ charges imposed prior to 20 April 2007 are not illegal as it was based on ss. 10(3) and 13(2) of the Free Zones Act 1990. At p. 11 (para. 18) of her grounds of judgment the learned High Court judge held as follows:

> Section 10(3) empowers the Minister to impose such conditions he may deem fit in respect of any activity that the Minister may allow to be carried out in the free zone. The words "any activity"

would necessary refer to other activities not specifically mentioned in the First and Second Schedule. It is not disputed that the Plaintiffs' activities fall within the First Schedule. To my mind if section 10(3) allows the Minister to impose such conditions that he deems fit on activities carried out other than those mentioned in the First and Second Schedule, by necessary implication the Minister has the power to impose conditions he deems necessary in respect of activities mentioned in those Schedules. Such conditions must necessarily relate to the activities carried out. Counsel for the Defendants submits that this would include imposition of FCZ charges, issuance of passes, licences and provision of overall security of the free zone.

[14] To strengthen the respondents' case, the learned High Court judge had also ruled that the Act imposes an obligation on the first respondent as the authority appointed by the Minister to administer, maintain and operate the KLIA FCZ; and s. 13(2) of the Act imposes a mandatory obligation on the first respondent as the authority to comply with the directions given by the Minister of Finance. The learned High Court judge cited s. 13(1) and (2) which reads:

(1) the Minister may require the Authority to provide and maintain or allow in a free zone such facilities as he may consider necessary for the proper and efficient functioning of such zone; and

(2) the Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone or for the purpose of protecting revenue; and the Authority shall comply with such directions.

[15] The learned High Court judge also concluded that the Minister of Finance has the power to impose FCZ charges even prior to 27 April 2007; the Minister has decided that the charges be imposed at the rate of RM5 per declaration and based on the evidence adduce the learned judge was satisfied that the rate imposed was reasonable.

Decision Of This Court

[16] It is well settled principle of law that imposition any form of tax, duty, charge, levy, fee or other forms of financial obligations on any person must be expressly provided for in a statute passed by the Parliament or the relevant legislative body. Such imposition must be expressed in plain and unambiguous language in the particular statute.

[17] The law relating to this issue has been clearly adopted by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, where it was held, *inter alia* that "if a person is to be made liable for a tax, charge or levy, such liability must be expressed in plain and unambiguous language in the particular statute; if Parliament does not do so, then it is not open to a delegate of the power to impose the levy to make the identifications".

[18] In that case, Gopal Sri Ram JCA (as he then was) stated:

> In Malaysia, the Federal Constitution has entrusted the law making power to Parliament and the State Assembly of each of the several States of the Federation. While the courts through the common law recognize the power of Parliament to delegate some of its legislative power, it is equally the constitutional duty of the courts to ensure that no excessive delegation takes place. Hence the well settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy - call it a tax or charge or cess or whatever you may - upon the whole or any section of the public.

[19] In the case of *Gosling v. Veley* [1850] 12 QB 328, at p. 407 Chief Justice Wilde ruled:

> The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, expect upon clear and distinct legal authority established by those who seek to impose the burthen, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.

[20] Parliament may pass legislation (by an Act of Parliament) requiring the subjects to pay tax, charge, levy or other financial liabilities. Parliament may also delegate its powers of imposing such payments to the Executives, (including Minister), but for that purpose, the clearest words should be required. This had been

stressed by Scrutton LJ in the case of *Attorney-General v. Wilts United Dairies Ltd* [1921] 37 TLR 884; [1922] 38 TLR 781, where His Lordship said:

> It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the Executive, but in my view the clearest words should be required before the Courts hold that such an unusual delegation has taken place.

[21] The intention of the Parliament to impose tax, duty or charge must strictly be construed from the wordings of the statute. It is a well settled principle of law that the wordings of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words. (see: *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Issued As Incorporated Partnership)* [2011] 7 CLJ 46).

[22] In the absence of a clear intention in the law that tax, duty or charge should be imposed, the appellants (in the present case) are not liable to pay the charge imposed on them. The decision of Gill FJ in *Comptroller-General of Inland Revenue, Malaysia v. T* [1969] 1 LNS 31; [1970] 2 MLJ 35 clearly supports the above proposition. In that case, it was held that:

> It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax. In this connection, Lord Blackburn said in the House of Lords in *Coltness Iron Company v. Black* [1880-81] 6 App Cas 315, 330:
>
> > No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. ... and I think the only safe rule is to look at the words of the enactment and see what is the intention expressed by those words.
>
> Lord Simonds in *Russell v. Scott* [1948] 2 All ER 1, 5 reasserted the same rule of construction when he addressed the House of Lords in the following words:
>
> > My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed

A unless the taxing statutes unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion.

[23] In the present case, the learned High Court judge held that ss. 10(3) and 13(2) of the Free Zones Act 1990 by implication empower the Minister of Finance to impose the FCZ charges and the imposition of the said charges even prior to 27 April 2007 is not illegal.

[24] Section 10(3) of the Act provides;

(3) Notwithstanding anything to the contrary in any written law, the Minister of Finance may allow any activity to be carried in a free zone subject to such conditions as he may deem fit to impose.

[25] Section 13(2) of the Act provides:

(2) The Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone or for the purpose of protecting revenue; and the authority shall comply with such directions.

[26] We are of the view that the language of both ss. 10(3) and 13(2) of the Act on the face of it does not show any intention on the part of the Parliament to confer on the Minister of Finance a discretion or power to impose any charge or levy in respect of activities carried in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ. Clearly, the provisions of ss. 10(3) and 13(2) of the Act do not express in plain and unambiguous language the intention of Parliament to provide powers to the Minister to impose such charges in the free zone.

[27] That being the case, it necessarily follows that reg. 8A of the Free Zones Regulations 1991 which came into force on 20 April 2007 (by way of gazette P.U (A) 166/2007) is in turn *ultra vires* the Act. As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia* (*supra*) the well settled principle that a provision in statute conferring power on a member of the Executive to enact subsidiary legislation particularly one that imposes a financial levy or charges upon any section of the public must be construed strictly. The

power from any subsidiary legislation can never rise above that in its parent Act (see: the Federal Court decision in *Kerajaan Malaysia v. Wong Pot Heng & Anor* [1997] 2 CLJ 188).

[28] The power to give such directions for "the purpose of protecting revenue" under s. 13(2) of the Act should not be interpreted to include the power to impose charge for the FCZ. The words 'protecting revenue' as used in sub-s. (2) must be read to refer to the activity by the authority "to provide adequate enclosures to segregate a free zone from the principal customs area for the protection of revenue together with suitable provisions for the movement of persons, conveyances, vassels and goods entering or leaving a free zone" as stipulated under sub-s. (4) of the same section. The words 'protecting revenue' must refer to the revenue of the government from collection of faxes by the customs relating to "movement of persons, conveyances, vassels and goods entering or leaving the zone". The relevant part of the Parliament's Hansard dated 16 March 1990 indicates the real intention of s. 13 of the Free Zones Act 1990. There is no indication at all that sub-s. (2) is meant to empower the Minister of Finance to impose charges on the members of AFAM including the appellants. The relevant part of the Hansard is reproduced below:

> Pasal ini juga mengenakan satu kewajipan ke atas pihak berkuasa untuk mengadakan kemudahan-kemudahan kepada pegawai-pegawai kastam bagi pengawasan yang sepatutnya ke atas barang-barang yang dibawa ke dalam atau keluar dari suatu zon bebas dan untuk menyediakan kepungan-kepungan yang mencukupi bagi mengasingkan suatu zon bebas dari kawasan utama kastam bagi perlindungan hasil dan juga mengawal pergerakan orang-orang, kenderaan-kenderaan, vesel dan barang-barang yang masuk dan keluar dari suatu zon bebas.

[29] Parliament may delegate some of the powers to a Minister or any administrative body; and such delegation must be confined to the express authority delegated to it. It is the duty of the court to carefully scrutinise the extent of the delegation particularly in cases which involves a right to impose any financial burden on a person or class of persons. This was clearly pronounced by McRuer CJ in the case of *Gruen Watch of Canada Ltd v. Attorney General of Canada* [1950] OR 429 as follows:

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority

A delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinised than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

B (see also: *Attorney General v. Wilts United Dairies Ltd* (1921) 37 TLR 884).

[30] Based on the above mentioned considerations, we can safely conclude that the Minister of Finance has no legal power to impose charges on the members of AFAM (including the C appellants) in relation of the FCZ in KLIA. Consequently the charges which were imposed on them as directed by the Ministry official in her letter dated 18 May 2007 were without legal basis and unlawful. On this ground alone, the appellants' appeal can be allowed and the decision of the learned High Court judge on this D matter can be set aside.

[31] The issue as to whether reg. 8A of the Free Zones (Amendment) Regulations 2007 which came into effect from 20 April 2007 and which forms the basis of the imposition of the E FCZ charges, can have retrospective effect, was also raised before us. This issue is only relevant if we are to find that the said reg. 8A is valid in law, but not otherwise. In the present case, we have earlier concluded that the said reg. 8A is *ultra vires* the parent Act (the Free Zones Act 1990) and therefore invalid. F Therefore the question whether reg. 8A can be effective retrospectively does met arise. However, for completeness of these grounds of judgment, we shall now deal with the issue assuming for a moment that the said reg. 8A is legally valid and not *ultra vires* the parent Act.

G **[32]** The said reg. 8A first came into force on 20 April 2007 by way of gazette P.U (A) 166/2007. Prior to that date, there was no other express provision in the parent Act or the 1991 Regulations regarding the imposition of free zone charges; and no such charges are legally payable until the amendment came into H force. The first respondent, as the authority appointed by the Minister of Finance for the FCZ, claimed that as at 14 May 2007 (three weeks after the said reg. 8A came into force on 20 April 2007) there were arrears of RM24,092,834 of the charges remained unpaid by the members of AFAM (including the I

appellants). Presumably, the arrears must have been related to unpaid FCZ charges imposed long before the effective date of 20 April 2007. The question is can the said reg. 8A, assuming it to be legally valid be enforced retrospectively? A

[33] Section 19(1) of the Interpretation Acts 1948 (Act 388) and 1967 provides: B

> (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is so provided, the date immediately following the date of its publication in pursuance of section 18. C

[34] Under s. 20, of the same Act 388 "subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act - provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published." D

[35] Reading both ss. 19 and 20 of Act 388, it is crystal clear that the commencement of a subsidiary legislation (in our case - reg. 8A) shall be the date provided in the Free Zones (Amendment) Regulations 2007. Since there is no specific date for commencement stated in the said Regulations, then the commencement date for reg. 8A must be the date immediately following the date of its publications, ie, 20 April 2007. E F

[36] If we are to invoke s. 20 of the 388 Act, a subsidiary legislation can only be made to operate retrospectively under the said section if the retrospective commencement date is expressly stated in the subsidiary legislation itself. In the present case, no retrospective commencement date is provided for or stated in the said Regulations. Therefore, the only conclusion that be drawn is that the commencement date of reg. 8A must be on 20 April 2007, the date immediately following the date of its publication. Section of 47 of the Free Zones Act 1990 which is the enabling section for the Regulations also does not expressly confer any power to the Minister of Finance to legislate retrospectively. Therefore, the inevitable conclusion that we can arrive at is that the said reg. 8A, assuming it to be legally valid, can only came into force prospectively and not retrospectively. G H I

[37] The Court of Appeal in the case of *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Berhad* [1995] 1 CLJ 491; [1995] 1 MLJ 292 had ruled that:

> In order to determine whether a written law is prospective or retrospective, the court must first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectively. The converse is true where the written law does not affect substantive rights.

[38] In this case of *Syed Ibrahim Syed Mohd & Ors v. ESSO Production Malaysia Incorporated* [2004] 1 CLJ 889, the Court of Appeal held that "a subsidiary legislation with retrospective effect would apply to procedural matters but not to a right".

[39] In this respect we are in agreement with Mustapha Hussain J in the case of *United Asian Bank Bhd v. The Negeri Sembilan Development Corporation* [1988] 1 LNS 206; [1989] 1 MLJ 230 where His Lordship, held:

> The issue before the court is whether the bringing into retrospective effect of certain provisions of the law involved could have effect on a party's rights or obligations. This court is of the view that the law cannot be made retrospective to deprive the rights of a party that were legally enshrined by the relevant law at that point of time. It is most unfair to resort to retrospective enactments just to avoid a party's legal obligations.

[40] There are other authorities supporting the above proposition. *In Re Athlumney* [1898] 2 QB 547, Wright J said:

> Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation.

(see also: *Re Chapman* [1896] 1 Ch 323; and *Pardo v. Bingham* [1868-1869] 4 LR Ch App 735).

[41] The issue of retrospective law was also expressed by Willes J in *Phillips v. Eyre* [1870] LR 6 QB 1 at p. 23:

> Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

[42] On the same issue, Prof MP Jain in his text book "*Administrative Law of Malaysia and Singapore*" (2nd edn, 1989) at p. 93 says:

> Parliament can enact laws with retrospective effect, but a subordinate legislator has to act within the limits of the power delegated to him, and a mere general power to make regulations does not empower him to make regulations with retrospective effect. The reason for this rule is that retrospective legislation disturbs vested rights of the people, and this only the legislature should do.

[43] On the strength of the above authorities we were of the view that the power to impose and collect FCZ charges under reg. 8A, which only came into force on 28 April 2007 cannot be enforced retrospectively. As the first respondent's counterclaim against the appellants consists of FCZ charges pre-dating back the Free Zones (Amendment) Regulations 2007, we conclude that the imposition of the said charges retrospectively by the first respondent prior to the effective date of 20 April 2007 is *ultra vires* the Act and the Regulations. The learned High Court judge had erred in allowing the first respondent's counterclaim against the appellants.

[44] The letter dated 18 May 2007 from one Datuk Aziyah Bahauddin, from the Ministry of Finance, cannot in any way be interpreted as an effective retrospective direction of the Minister of Finance. The learned High Court judge had erred in concluding that the said letter as constituting an effective retrospective direction when such direction is *ultra vires* the Act and the Regulations. At most, the letter is merely an administrative communication between the official of the Ministry of Finance and the Chairman of AFAM on the same subject matter. It is not a legal direction. It is also not, a subsidiary legislation. Obviously the said letter cannot be used as a basis for the imposition of the FCZ charges as has been done in the present case. The RM5 rate for each declaration form as imposed in the said letter and the amount of RM24,092,834 alleged to be arrears of the FCZ charges clearly have no legal effect and do not create any liability on the members of AFAM (including the appellants) to pay.

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Conclusion

[45] Based on the above considerations, we are satisfied that the learned High Court judge had erred in dismissing the appellants' claim and allowing the first respondent's counterclaim against the
B appellants. We therefore unanimously allow the appeal with costs of RM50,000 (here and below) to the appellants and the deposit to be refunded to the appellants. The decision of the learned High Court judge is hereby set aside. Consequently, we make an order allowing the appellants' application as per prayers (a), (b), (c) and
C (d) of the appellant's claim.

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